DEPARTMENT OF THE ARMY
Wilmington District. Corps of Engineers
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June 3, 2008

PUBLIC NOTICE

The Wilmington District Corps of Engineers, Regulatory Division, announces several changes to the current practices regarding compensatory mitigation for impacts to waters and wetlands authorized by Section 404 and Section 10 permits. Additional information regarding these changes is provided below and in the attachments to this Public Notice

1. Framework for Mitigation Banks (Attachment A): This document provides updated information regarding credit release schedules for streams and wetlands, geographic service areas, standards for the description of wetland community types, and information regarding in-kind vs. out-of-kind considerations.

2. Dichotomous Key (Attachment B): This document provides a key to the 16 wetland types whose functional attributes can be assessed using the NC Wetland Assessment Methodology (NC WAM). (NOTE: NC WAM is slated to be released as a final document in the next several months as an interagency approved method to allow the rapid assessment of the functions provided by wetland communities found in NC. A fundamental component of NC WAM is the Key to the 16-wetland types.) The Corps endorses the development and use of consistent nomenclature regarding wetland community descriptions. The Key is a critical element of NC WAM and will allow the regulatory and resource agencies as well as the regulated public to describe impacts and mitigation in a standardized manner. In that regard, the Regulatory Division is releasing the Key in advance of NC WAM to allow the regulated community to become familiar with its use. Applicants are strongly encouraged to adopt this method and to report impacts on any Department of the Army Application pursuant to this Key.

These documents may also be accessed online at:
http://www.saw.usace.army.mil/WETLANDS/Mitigation/2008-updates.html
Also, links to changes in the National Program mitigation rule described below are on this web page.

3.New Mitigation Rule: On April 10, 2008, the US Army Corps of Engineers and US Environmental Protection Agency released a final rule regarding Compensatory Mitigation for Losses of Aquatic Resources (33 CFR Part 352 and 332) . This rule becomes effective on June 6, 2008. Property owners and their consultants who are involved with Section 404 and Section 10 permit requirements are strongly encouraged to read and become familiar with this rule.

Part of this rule addresses new requirements for permit applications (see Part 325.1) Specifically:

> **For activities involving discharges of dredged or fill material into waters of the United States, the application must include a statement describing how impacts to waters of the United States are to be avoided and minimized. The application must also include either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts. (See § 332.4(b)(1) of this chapter.)**

Accordingly, future applications for standard (Individual) permits must provide a statement that satisfies the above requirements. NOTE: The Regulatory Division acknowledges that this information is contained in many applications now, if this information is contained elsewhere in the application (e.g., as a separate alternatives analysis or mitigation proposal), there is no need to repeat as a separate item; it may be referred to by page or section number.

The Regulatory Division may elect to return any application as incomplete if the required information is not contained therein or does not contain all information regarding activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required.

It is our understanding that the Application for Department of the Army Permit (Form 4345) is being revised and that this information will be specifically requested on that revised application form once it is finalized.

(Public Notice - Attachment A)

Revised Framework for Mitigation Review in NC - April 22, 2008

This framework has been developed in accordance with all applicable regulations, policy, guidance related to the establishment of Mitigation Banks in NC. In addition, headquarters, USACE and EPA has published a final rule concerning Mitigation Banks, In-Lieu-Fee programs, and permittee responsible mitigation (33 CFR 325 and 332, Thursday, April 10, 2008), and this framework has been developed in reliance on that rule. The term "Interagency Review Team" or IRT found in the rule have been adopted here for clarity.

IRT Membership

Review and oversight of stream and wetland compensatory mitigation banks in NC will be provided by an Interagency Review Team (IRT), formerly the MBRT, composed of representatives from the state and Federal resource agencies as follows:

US Army Corps of Engineers
US Environmental Protection Agency
US Fish &Wildlife Service
NC Wildlife Resources Commission
NC Division of Coastal Management
NC Division of Water Quality
National Marine Fisheries Service

Roles

The goal of the IRT is to ensure that implementation, monitoring, and use of compensatory mitigation conducted in NC for impacts permitted pursuant to Sections 404 and 401 of the Clean Water Act and the Coastal Area Management Act is provided in a consistent manner, provides the suite of expected aquatic functions being restored, and will be self sustaining over the long term. It is expected that USACE review of mitigation banks will be conducted primarily by a designated POC in the USACE Field Office in which the bank is located.

All meetings of the IRT will be chaired by a USACE representative.

Depending on the number of Banks under review, the USACE IRT Chair may elect to hold IRT meetings on a regular basis with times and locations advertised by USACE/NCDWQ public notice in advance to ensure that all interested parties have opportunity to be placed on the agenda.

Mitigation providers will be allowed to attend to discuss prospectus, MBI's, monitoring reports and credit release provided such information is provided to the IRT at least 30 days prior to the meeting date. Items placed on the agenda will be at the discretion of the Chair.

This process is intended to facilitate the review of proposed mitigation banks in NC.

Banking Threshold Issues:

Description of Community Types:

Wetland community types found in a mitigation bank will be described in accordance with the procedures found in the NC Wetland Assessment Method (NC WAM, USACE, 2007). It is expected that impacts to the NC WAM types listed below will be compensated by the Mitigation Types as listed in order to qualify as "In-Kind" mitigation. Exceptions to the use of "In-Kind" mitigation may be allowed at the discretion of the permitting agencies on a case-by-case basis. The dichotomous key and instructions on its use may be found at

Mitigation Type	NCWAM Type
CAMA CoastalWetland	Salt/Brackish Marsh*
Riverine	Riverine Swamp Forest/Non-Tidal Freshwater Marsh, Tidal Freshwater Marsh
Riparian	Bottomland Hardwood Forest, Headwater Wetland, Flood-Plain Pool, Mountain Bog*
Non-Riparian wetter variety	Non-Riverine Swamp Forest, Seep, Small Basin Wetland, Pocosins, Estuarine Woody
Non-Riparian, Drier Variety	Pine Flat, Pine Savannah, Hardwood Flat

Wetland Mitigation Credit:

Wetland mitigation credits will be based on restoration equivalents such that:

1 acre of Restoration is equal to 1 restoration equivalent
2 acres of Enhancement is equal to 1 restoration equivalent
3 acres of creation is equal to 1 restoration equivalent
5 acres of Preservation is equal to 1 restoration equivalent

In order to satisfy a mitigation requirement of 2 acres of Restoration the mitigation provider must supply at least one acre of Restoration, the rest may be made of Enhancement, Preservation, or in exceptional cases Creation in the equivalent amounts listed above.

Note that the NC Division of Coastal Management requires 1:1 restoration of CAMA Coastal Wetlands. Neither Enhancement nor Preservation are accepted as mitigation for this community type

Stream Mitigation Credit

Stream Mitigation Credit will be based on the existing Stream Mitigation Guidelines (USACE, 2003) and reproduced here:

Mitigation Type	Restoration Equivalents
Restoration	**1.0**
Enhancement I	**1.0 to 1.5**
Enhancement II	**1.5 to 2.5**
Preservation	**2.5 to 5.0**

Assessment of stream quality will be conducted using the USACE Stream Quality Assessment worksheet which may be accessed at:

http://www.saw.usace.army.mil/WETLANDS/Forms/stream_quality.pdf

Stream Mitigation providers, especially those that are involved with stream mitigation on the Outer Coastal Plain, are strongly encouraged to read and become familiar with the information contained in the USACE/DENR paper dated December 1, 2005 entitled:

INFORMATION REGARDING STREAM RESTORATION IN THE OUTER COASTAL PLAIN OF NORTH CAROLINA, prepared by the US Army Corps of Engineers, Regulatory Division and the NC Department of Environment and Natural Resources, Division of Water Quality.

This paper may be accessed at:

(http://www.saw.usace.army.mil/WETLANDS/Policies/HWM12_1_05.pdf

Credit Release Schedules:

Wetland Credit Release Schedule:

If deemed appropriate by the IRT, fifteen percent (15%) of a bank's total restoration credits shall be available for sale immediately upon completion of all of the following:

1. Execution of the mitigation banking instrument by the Sponsor, the Corps, and

other agencies eligible for membership in the MBRT who choose to execute the agreement;

2. Approval of the final mitigation plan;
3. Delivery of the financial assurances;
4. Recordation of the preservation mechanism, as well as a title opinion acceptable to the Corps covering the property;

Additionally, no later than the first full growing season following initial debiting of the bank, the Sponsor must complete the initial physical and biological improvements to the bank site pursuant to the mitigation plan.

Provided such physical and biological improvements are made to the IRT's satisfaction an additional 15% (total 30%) of the banks total credits shall be available for sale.

Subject to a bank sponsor's continued satisfactory completion of all required success criteria and monitoring, additional restoration mitigation credits will be available for sale by a bank sponsor on the following schedule:

10% after first year, if interim success measures are met (total 40%);

15% after second year; if interim success measures are met (total 55%);

20% after third year; if interim success measures are met (total 75%);

10% after fourth year; if interim success measures are met (total 85%);

15% after fifth year, if Success Criteria are met (total 100%)

Stream Credit Release:

The following credit release schedule applies only to those stream projects where Restoration or Enhancement I has been performed where pattern, dimension, and profile, or dimension and profile (respectively) have been improved. Projects constructed on the outer coastal plain that are subject to the Coastal Plain Information Paper (USACE/DWQ 2007) where an engineered stream channel was not constructed, will be subject to the criteria enumerated for wetlands above:

If deemed appropriate by the IRT, fifteen percent (15%) of a banks total stream credits shall be available for sale immediately upon completion of all of the following:

1. Execution of the mitigation banking instrument by the Sponsor, the Corps, and other agencies eligible for membership in the IRT who choose to execute the agreement;

2. Approval of the final mitigation plan;

3. Delivery of the financial assurances;

4. Recordation of the preservation mechanism, as well as the title opinion covering the property that is acceptable to the Corps.

Additional stream credits would be available according to the following release schedule:

- Construction release:

  15 % upon completion of all initial physical and biological improvements made pursuant to the mitigation plan: (30% cumulative)

- After year 1:

  10% provided channel is stable and all other success criteria are met (40%).

- After year 2:

  10% provided channel is stable and all other success criteria are met (50%).

- After year 3:

  10% provided channel is stable and all other success criteria are met (60%)

- After year 4:

  10% provided channel is stable and all other success criteria are met (70%)

- After year 5:

  15% provided channel is stable and all other success criteria are met (85%)

  A reserve of 15% of the banks total stream credits shall be released any time after 2 bank-full events have occurred, in separate years, provided the channel stable and all other success criteria are met. In the event that less than two bank-full events occur during the monitoring period, remaining credit release shall be at the discretion of the MBRT.

Geographic Service Area

In most cases, the Primary Geographic Service Area (PGSA) of a mitigation bank (Bank) will be confined to the 8-digit HUC in which the Bank is located. However, use of the Bank for impacts located outside the PGSA may be considered on a case-by-case basis, during the permit evaluation process.

The permitting agencies may, at their discretion, elect to require additional mitigation due to the distance between the impact site and mitigation site.

Dichotomous Key to General North Carolina Wetland Types, v8, 4/30/08

Before using this key, the assessor should have read and become familiar with the descriptions of the general wetland types. The assessor should use best professional judgment to verify that the wetland type determined with the use of this key matches the written description.

The following rules should be used to assist the assessor in the selection of the most appropriate general wetland type. Narrative descriptions are also available to assist in this choice (see User Manual Section 3.1).

> Wetlands with modifications (man-made or natural) should generally be classified as the original, naturally occurring type if this determination can be made. However, if the full range of stable, existing, wetland characteristics (vegetation, hydrology, and soils) better resemble another wetland type because of long-established, permanent alterations, the wetland should be classified as this current, more appropriate type.

If there is evidence suggesting the wetland is a type other than the keyed type, the wetland may be classified as the evidenced type. Also, if the wetland does not appear to conform to any of the following general types, the site should be evaluated based on what the assessor believes is the closest wetland type. If the wetland is "intensively managed" or "intensively disturbed," the assessor should note this fact on the field assessment form and then select the most appropriate general wetland type based on the guidance provided above.

I. Wetland affected by lunar or wind tide, may include woody areas adjacent to tidal marsh
- A. Wetland affected, at least occasionally, by brackish or salt water
  - i. Dominated by herbaceous vegetation – **Salt/Brackish Marsh**
  - ii. Dominated by woody vegetation – **Estuarine Woody Wetland**
- B. Wetland primarily affected by freshwater
  - i. Dominated by herbaceous vegetation – **Tidal Freshwater Marsh**
  - ii. Dominated by woody vegetation – **Riverine Swamp Forest**

II. Wetland not affected by tides
- A. Not in a geomorphic floodplain and not associated with a natural linear conveyance (such as a topographic crenulation), nor associated with a natural lake greater than or equal to 20 acres in size
  - i. On a side slope – **Seep**
  - ii. On interstream divides or on a coastal island
    1. Flats on interstream divides in Coastal Plain ecoregions
       - a. Dominated by deciduous trees
         - i. Intermittently to seasonally inundated (typically dominated by sweetgum and oaks) – **Hardwood Flat**
         - ii. Seasonally to semi-permanently inundated (typically dominated by cypress, black gum, and oaks) – **Non-Riverine Swamp Forest**
       - b. Dominated by evergreens
         - i. Dominated by dense, waxy shrub species (typically include gallberries, fetterbushes, honeycup, greenbriar); canopy may include pond pine, Atlantic white cedar, and bays – **Pocosin**
         - ii. Not dominated by dense, waxy shrub species
           1. Dominated by long-leaf or pond pine and wire grass – **Pine Savanna**
           2. Dominated by loblolly or slash pines – **Pine Flat**
    2. In depressions surrounded by uplands anywhere in the state (mafic depressions, lime sinks, Carolina bays) or on shorelines of lakes/pond

Dichotomous Key To General NC Wetland Types, Continued

2. In depressions surrounded by uplands anywhere in the state (mafic depressions, lime sinks, Carolina bays) or on shorelines of lakes/ponds (repeated from the previous page)
   a. Dominated by dense, waxy shrub species (typically include gallberries, fetterbushes, honeycup, greenbriar); canopy may include pond pine, Atlantic white cedar, and bays and not characterized by clay-based soils– **Pocosin**
   b. Not dominated by dense, waxy shrub species and not characterized by a peat-filled bay – **Small-Basin Wetland**

B. In a geomorphic floodplain or associated with a natural linear conveyance (such as a topographic crenulation) or along shorelines of natural water bodies greater than 20 acres or artificial impoundments
   i. Northern Inner Piedmont or Blue Ridge Mountains ecoregions and dense herbaceous or mixed shrub/herbaceous vegetation with characteristic bog species (see wetland type description), with or without tree canopy; typically long-duration saturation; sphagnum moss commonly present – **Mountain Bog**
   ii. Anywhere in the state and not Mountain Bog
      1. Dominated by herbaceous vegetation. At least semi-permanently inundated or saturated. Includes lacustrine and riverine fringe and beaver ponds with dense herbaceous vegetation; sphagnum moss scarce or absent – **Non-Tidal Freshwater Marsh**
      2. Dominated by woody vegetation. Trees may be present on edges or hummocks.
         a. Localized depression and semi-permanently inundated – **Floodplain Pool**
         b. Not "a"
            i. Zero- to 1st-order stream[1]. Diffuse surface flow and groundwater more important than overbank flooding.
               1. Intermittently inundated to seasonally saturated – **Headwater Forest**
               2. Seasonally to semi-permanently inundated – **Riverine Swamp Forest**
            ii. Second-order or greater stream or associated with the shoreline of waterbodies 20 acres or greater
               1. Intermittently to seasonally inundated for long duration (may be dominated by sweetgum, ash, sycamore, and oaks) – **Bottomland Hardwood Forest**
               2. Seasonally to semi-permanently inundated for very long duration (may be dominated by cypress and blackgums in Coastal Plain and ash, overcup oak, and elms in Piedmont and Mountains) – **Riverine Swamp Forest**